HSS Asia Pacific Sdn Bhd v Actacorp Holdings Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–308 OF 1997
KAMALANATHAN RATNAM J
5 JANUARY 2000

Contract *— Payment for work done — Claim for balance due for work done — Defences — Whether query by defendant adequately responded to by plaintiff — Whether report submitted to defendant was merely an interim report — Whether work was completed — Schedule of payment for services rendered agreed to by parties — Whether claim for balance due should be allowed*

The plaintiff was retained by the defendant as general consultant to provide management, technical, traffic and financial consultancy services for the feasibility studies ('the studies') for the privatization of expressways in the State of Karnataka in India. Having completed the report, the plaintiff submitted the same to the defendant who referred it to the government of the State of Karnataka which raised one query. The plaintiff replied the query by a letter dated 27 February 1997 and informed that additional costs would be incurred if updating of the feasibility report was required. The plaintiff thereafter submitted various invoices amounting to RM1,354,576.16. Out of this sum, the defendant paid the plaintiff a sum of RM734,199.10. By letters dated 1 July 1996 and 26 June 1997 to the plaintiff, the defendant proposed payment of the outstanding balance by four monthly instalments and by ten equal monthly instalments respectively. Subsequently, the plaintiff filed an application for judgment for the balance. On 23 June 1998, the learned deputy registrar made an order giving judgment for a sum of RM310,000. She directed that the balance sum amounting to RM310,377.10 be determined upon trial. There was no appeal against this decision. The trial proceeded for the balance sum only. The defendant never disputed during the proceedings the invoices and vouchers submitted. The defendant contended that: (i) the plaintiff had not completed the report; and (ii) the retention sum. The defendant also filed a counterclaim.

Held, granting judgment for the plaintiff in the sum of RM310,377.10 with interests and costs, and dismissing the defendant's counterclaim with costs:

(1) There was no defence to the non-payment of the balance due. The defendant's witness admitted that the only query raised by the government of the state of Karnataka was adequately responded to by the plaintiff by the letter dated 27 February 1997 (see p 463H).

(2) The contention that the plaintiff had not completed the report was rejected as it was too late in the day for the defendant to raise this issue now, having agreed and admitted to all the vouchers and never disputed the same, and having made part payment

and also by failing to appeal against the decision of the learned deputy registrar when she awarded a sum of RM310,000 (see p 462A–B).

(3) The report was not an interim report as there is no documentary evidence tendered to show that the defendant had all along maintained such a view. In fact, the letters dated 1 July 1996 and 26 June 1997 contradicts the contention of the defendant as the defendant proposed payments of the balance outstanding by four and ten monthly instalments respectively (see p 463B–C, F).

(4) From the evidence, the plaintiff had only claimed 90% and not the full sum based on the schedule of payment agreed to by the parties. In any case, the defendant had not raised a whimper of a protest in respect of this issue prior to paying the initial sum of RM734,199.10 (see p 462F–G).

(5) Notwithstanding that the letter dated 26 June 1997 was headed 'without prejudice', the defendant could not protect itself with this label as the defendant did not dispute the entry of this letter as an agreed and admitted document and the defendant's witness referred to this letter in his examination-in-chief (see p 463F–G).

(6) Since there was no liability upon the plaintiff in respect of this claim in that there was no basis upon which the counterclaim could be launched, the counterclaim was rejected. The defendant's complaint that it suffered loss due to the fact that the plaintiff had not completed the report in time and that it had merely sent in an interim report was baseless (see p 464C).

[Bahasa Malaysia summary

Plaintif telah diambil oleh defendan sebagai perunding am untuk memberikan perkhidmatan perundingan pengurusan, teknikal, trafik dan kewangan untuk kajian kebolehlaksanaan ('kajian tersebut') untuk penswastaan lebuhraya-lebuhraya di Negeri Karnataka di India. Setelah menyiapkan laporan tersebut, plaintif telah mengemukakannya kepada defendan yang telah merujukkannya kepada Negeri Karnataka yang mana telah membangkitkan satu pertanyaan. Plaintif telah menjawab pertanyaan tersebut melalui surat bertarikh 27 Februari 1997 dan memaklumkan bahawa kos tambahan akan dialami sekiranya perlu mengemaskini laporan kebolehlaksanaan tersebut. Plaintif selepas itu mengemukakan beberapa invois yang berjumlah sebanyak RM1,354,576.16. Daripada jumlah ini, defendan telah membayar plaintif satu jumlah sebanyak RM734,199.10. Melalui surat-surat bertarikh 1 Julai 1996 dan 26 Jun 1997 kepada plaintif, defendan mencadangkan pembayaran bagi baki yang masih belum jelas melalui empat ansuran bulanan dan melalui sepuluh ansuran bulanan yang sama. Kemudian, plaintif telah memfailkan satu permohonan untuk penghakiman bagi baki tersebut.

Pada 23 Jun 1998, penolong pendaftar yang arif telah membuat satu perintah yang memberikan penghakiman bagi jumlah sebanyak RM310,000. Beliau mengarahkan bahawa jumlah baki sebanyak RM310,377.10 hendaklah ditentukan setelah perbicaraan. Tiada rayuan terhadap keputusan ini. Perbicaraan tersebut telah diteruskan bagi jumlah baki sahaja. Defendan tidak pernah mempertikaikan ketika prosiding tersebut invois-invois dan baucer-baucer yang telah dikemukakan. Defendan menegaskan bahawa: (i) plaintif telah tidak menyiapkan laporan tersebut; dan (ii) jumlah penahanan tersebut. Defendan telah juga memfailkan tuntutan balas.

Diputuskan, memberikan penghakiman untuk plaintif dalam jumlah sebanyak RM310,377.10 dengan faedah serta kos, dan menolak tuntutan balas defendan dengan kos:

(1) Tiada pembelaan kepada ketiadaan pembayaran akan baki yang kena dibayar. Saksi defendan mengakui bahawa satu-satunya pertanyaan yang dibangkitkan oleh kerajaan Negeri Karnataka telah dijawab dengan secukupnya oleh plaintif melalui surat bertarikh 27 Februari 1997 (lihat ms 463H).

(2) Penegasan bahawa plaintif telah tidak menyiapkan laporan tersebut telah ditolak kerana telah agak lewat bagi defendan membangkitkan isu ini sekarang, setelah bersetuju dan mengakui semua baucer dan tidak pernah mempertikaikannya dan setelah membuat sebahagian pembayaran dan juga dengan gagal untuk merayu terhadap keputusan penolong pendaftar yang arif apabila beliau mengawardkan jumlah sebanyak RM310,000 (lihat ms 462A–B).

(3) Laporan tersebut bukannya satu laporan interim kerana tidak terdapat keterangan dokumentar yang dikemukakan bagi menunjukkan bahawa defendan telah pada setiap masa mempertahankan pandangan yang sedemikian. Malahan, surat-surat bertarikh 1 Julai 1996 dan 26 Jun 1997 bercanggahan dengan penegasan defendan kerana defendan mencadangkan pembayaran baki yang masih belum jelas melalui empat dan sepuluh ansuran bulanan masing-masing (lihat ms 463B–C, F).

(4) Daripada keterangan tersebut, plaintif hanya menuntut 90% dan bukan jumlah penuh berdasarkan jadual pembayaran yang dipersetujui oleh pihak-pihak tersebut. Dalam sebarang keadaan, defendan telah tidak membangkitkan sedikitpun bantahan berhubung dengan isu ini sebelum membayar jumlah awal sebanyak RM734,199.10 (lihat ms 462F–G).

(5) Meskipun surat bertarikh 26 Jun 1997 mempunyai ungkapan 'tanpa memudaratkan', defendan tidak boleh melindungi dirinya dengan label ini kerana defendan tidak mempertikaikan kemasukan surat ini sebagai satu dokumen yang dipersetujui dan diakui dan saksi defendan telah merujuk kepada surat ini dalam pemeriksaan utamanya (lihat ms 463F–G).

(6) Oleh kerana tidak terdapat tanggungan ke atas plaintif berhubung dengan tuntutan ini iaitu tiada asas di mana tuntutan balas tersebut boleh dimulakan, tuntutan balas tersebut telah ditolak. Aduan defendan bahawa ia telah mengalami kerugian disebabkan hakikat bahawa plaintif telah tidak menyiapkan laporan tersebut pada masanya dan bahawa ia telah hanya menyampaikan satu laporan interim adalah tidak berasas (lihat ms 464C).]

Notes

For cases on payment for work done generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2670–2672.

Legislation referred to

Rules of the High Court 1980 O 27 r 3

Balvinder Singh (*Sri Ram & Co*) for the plaintiff.

Abdul Razak bin Abu Bakar (*Aishah Bevi bte A Rahman* with him) (*Thanggaiya Zawawi & Co*) for the defendant.

Kamalanathan Ratnam J:

Facts

By a letter of appointment dated 10 July 1995 from the defendant to the plaintiff, the plaintiff was retained as general consultant to provide management, technical, traffic and financial consultancy services for the feasibility studies ('the studies') for the privatization of expressways between Bangalore-Hassan-Mangalore and between Bangalore City-New Bangalore International Airport both in the State of Karnataka in India. The total professional fees agreed to was RM1,485,950 with agreed service tax amounting to RM64,050.

Findings of the court

It is the plaintiff's case that it had completed the studies. The said report has been included as an agreed and admitted document in the common agreed bundle of documents ('CABD') during case management. Having completed the report the plaintiff submitted the same to the defendant who referred it to the Government of the State of Karnataka which raised one query. The plaintiff then replied to the said query and since there was none thereafter the plaintiff submitted various invoices amounting to RM1,354,576.16. Again the said invoices have all been agreed and admitted to in the CABD. Out of this sum, the defendant paid the plaintiff a sum of RM734,199.10. Subsequently the plaintiff filed an application pursuant to O 27 r 3 of the Rules of the High Court 1980 ('the RHC') for judgment for the balance. On 23 June 1998, the learned deputy registrar made an order giving judgment for a sum of RM310,000. She directed that the balance sum amounting to RM310,377.10 be determined upon trial. There was no appeal against this decision.

The trial therefore proceeded before me for this balance sum only. It was the case of the defendant, as pleaded, that the plaintiff had not completed the report pursuant to the terms of reference of the Government of the State of Karnataka. I reject this contention from the outset. It is in fact too late in the day for the defendant to raise this issue now, having agreed and admitted to all the vouchers and having made part payment and also by failing to appeal against the decision of the learned deputy registrar when she awarded a sum of RM310,000.

Further the defendant never disputed any of the vouchers at any stage of the proceedings. To my mind, if the case of the defence is that the sums as claimed in the vouchers were not due, then either the defendant ought to have challenged the vouchers or admitted the vouchers subject to the plaintiff proving that the works as claimed in the vouchers had been completed. In other words, the amounts in the vouchers could have been agreed to, subject to proving the completion of the works claimed in the vouchers.

The retention sum

The letter dated 10 July 1995 said this in respect of the retention sum:

> 3.1 A retention sum (success fee) of 10% of the total Professional Fees (inclusive of service tax) which amounts to RM134,500 (RM128,095 — Professional Fees and RM6,045 — service tax) shall be paid to you upon approval by the Government of Karnataka, India to proceed with privatisation of the project and also subject to Actacorp Holdings Berhad proceeding with the project upon the agreed terms and conditions.

A study of this clause clearly shows that whilst the plaintiff is entitled to its full 90% of the professional fees (inclusive of service tax) the retention sum of 10% would be paid only upon approval being given by the Government of the State of Karnataka. I accept the evidence of PW1, the engineer in charge of the project, and PW2, the financial controller of the plaintiff, that the plaintiff had only claimed the 90% and not the full sum based on the schedule of payment agreed to by the parties. In any case, the defendant had not raised a whimper of a protest in respect of this issue prior to paying the initial sum of RM734,199.10.

No doubt a query was raised by the Government of the State of Karnataka in response to the report submitted by the plaintiff. By its letter dated 27 February 1997 the plaintiff whilst responding to the query raised by the Government of the State of Karnataka, also stated that 'in order to update the feasibility report we would incur additional cost in terms of professional fee (time cost inputs) and reimbursables. We will be advising you of the quantum of additional fee in due course'.

PW1 testified that the Government of the State of Karnataka did not give its approval for the project because the feasibility study had concluded that the traffic generated as a result of implementing the project would not generate sufficient income even with the implementation of toll collection. PW1, however, denied the defence suggestion that the Government of the

State of Karnataka had refused to give the approval because the feasibility report was incomplete. I am satisfied from the evidence adduced that the letter dated 27 February 1997 from the plaintiff to the defendant clearly indicated that if the plaintiff were to act further to update the feasibility report, additional costs would be incurred. I accept the evidence of PW1 that additional costs would be incurred as the updating would depend upon the scope of work required by the Government of the State of Karnataka, and also taking into consideration the specific areas which require the updating.

The defence was that the report tendered was an interim report. If that is so then there is no documentary evidence tendered to show that the defendant had all along maintained such a view. On the contrary, by a letter dated 1 July 1996 and addressed to the plaintiff the defendant proposed payment of the balance outstanding sum of RM670,377.05 by four monthly instalments. The said letter was signed by one Khor Han Kong, the Group General Manager for Finance. The said letter was indeed copied to one Abdul Hamid bin Cha, the executive director of the defendant, who testified for the defence as DW1. He contended in his evidence that the said letter was only a mere proposal and that the said letter was written without the authority of the defendant. He also contended that notwithstanding the fact that the said letter was said to have been copied to him, he had not seen it before. I reject this evidence of DW1. Surely common sense dictates that if the said Khor Han Kong had no authority from the defendant to write the said letter, the defendant ought to have immediately addressed a letter to the plaintiff retracting the contents of the said letter. This was never done. In any case, the said Khor Han Kong was not even called to testify that when he signed the said letter he did not have the said authority to do so. I also reject DW1's contention that he did not see the said letter earlier. That DW1 is not a witness of truth is further illustrated by the fact that the same DW1 has written a letter dated 26 June 1997 to the plaintiff, rescheduling the payment of the outstanding balance in ten equal monthly instalments. Notwithstanding the fact that the letter is headed 'without prejudice', it is my judgment that the defendant cannot protect itself with this label. This letter is an agreed and admitted document entered into the CABD pursuant to my directions given at case management stage. If this document was in dispute, it should have been raised at that stage. Further, DW1 himself has referred to this letter in his examination-in-chief. In all the circumstances, therefore, there is no effect to the 'without prejudice' label stamped on the said letter.

I find that there is no defence to the non-payment of the balance due. In his own examination-in-chief, DW1 admitted that the only query raised by the Government of the State of Karnataka was adequately responded to by the plaintiff by the letter dated 27 February 1997, earlier referred to. I had no hesitation in entering judgment for the plaintiff in the sum of RM310,377.10 with interest at 4% per annum from the date of service of the writ on the defendant and costs.

The counterclaim

I had, on 16 June 1999 when I gave my oral decision for the plaintiff, omitted to consider the defendant's counterclaim. The defendant's counterclaim was for a sum of RM1,780,657.54 made up as follows:

(a)	Pre-operating expenses	RM 1,768,362.00
(b)	Company formation expenses	2,500.00
(c)	Telephone and other expenses	3,500.00
(d)	Debt due to subsidiary companies	5,795.54
(e)	Other expenses	500.00
		RM 1,780,657.54

To prove this claim the defendant called its accounts executive, DW2. However, since I have found that there is no liability upon the plaintiff in respect of this claim in that there is no basis upon which the counterclaim could be launched, I reject the counterclaim. The defendant's complaint that it suffered loss due to the fact that the plaintiff had not completed the report in time and that it had merely sent in an interim report, is baseless. The counterclaim is also dismissed with costs.

Judgment for the plaintiff in the sum of RM310,377.10 granted with interests and costs; defendant's counterclaim dismissed with costs.

Reported by Moy Saw Han